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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TRANSPORTES AEREOS MERCANTILES PAN AMERICANOS, S.A., a/k/a TAMPA AIRLINES,
Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; DISTRICT 100, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Does an air or rail carrier commit a *per se* violation of section 2, First of the Railway Labor Act by changing its employees' pay, rules, or working conditions pending the completion of bargaining with a newly certified union, where no collective bargaining agreement is or has been in effect?

STATEMENT OF INTERESTED PERSONS

All parties to this case are named in the caption. Pursuant to Rule 29.1 of the Rules of this Court, petitioner Transportes Aereos Mercantiles Pan Americanos, S.A., a/k/a Tampa Airlines hereby states that it does not have any non-wholly owned subsidiary or any parent corporation.

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INTERNATIONAL ASSOCIATION
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WORKERS; DISTRICT 100,
INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE WORKERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Transportes Aereos Mercantiles Pan Americanos, S.A., a/k/a Tampa Airlines ("Tampa") petitions this Court to review the decision below holding that an air or rail carrier may not change employee pay, rules, or working conditions after the commencement of bargaining with a newly certified union, even though no pre-existing collective bargaining agreement was in place. The Eleventh Circuit's decision, unless re-

versed, will paralyze carriers faced with newly certified unions by locking in all existing pay, rules, and working conditions during the "virtually endless" and "purposely long and drawn out"[1] period of time during which carriers subject to the Railway Labor Act ("RLA") must engage in negotiations, mediation, and a "cooling off" period, even if a carrier needs to make changes to stay in business.

This case reflects a split among the circuits on an issue of great importance to the railroad and airline industries, a split that has occurred even though a prior decision of this Court, *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942) ("*Williams*") directly supports Tampa's position. This Court should resolve the conflict in the circuits by granting this Petition and deciding this important issue.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 924 F.2d 1005 and is reprinted at pages 1a to 13a of the Appendix ("App."). The order of the United States Court of Appeals for the Eleventh Circuit denying rehearing and rehearing in banc is not yet reported, but is reprinted at App. 27a-28a. The Eleventh Circuit's order staying issuance of the mandate on Tampa's motion is not yet reported, but is reprinted at App. 29a-30a. The preliminary injunction entered by the United States District Court for the Southern District of

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[1] *Burlington No. R. Co. v. Bhd. of Maintenance of Way Employees*, 481 U.S. 429, 444 (1987) ("*Burlington Northern*"); *Brotherhood of Ry. Clerks v. Florida East Coast Ry. Co.*, 384 U.S. 238, 246 (1966).

Florida, from which Tampa appealed, is not reported, but is reprinted at App. 14a-26a.

JURISDICTION

The opinion and judgment of the Eleventh Circuit were entered on February 27, 1991. App. 1a. On May 3, 1991, the Eleventh Circuit denied Tampa's Petition for Rehearing and Suggestion of Rehearing In Banc.[2] App. 27a-28a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the RLA, 45 U.S.C. § 151 *et seq.* The pertinent provisions of the RLA are reprinted at App. 55a-62a.

STATEMENT OF THE CASE

In 1942, this Court held that a carrier can make unilateral changes in employee pay, rules, and working conditions pending negotiations "where no collective bargaining agreements are or have been in effect . . . ." *Williams*, 315 U.S. at 402. The decisions of the Eleventh Circuit and the District Court expressly decline to follow that Supreme Court holding and instead conclude that *any* unilateral change in pay, rules, or working conditions after negotiations begin with a newly certified union, but prior to execution of an initial collective bargaining agreement, is a *per*

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[2] The Eleventh Circuit stayed issuance of the mandate on May 17, 1991, provided that it receives notice by July 1, 1991, that Tampa has filed a petition for writ of certiorari. *See* App. 29a-30a.

se violation of section 2, First of the RLA, 45 U.S.C. § 152, First. App. 5a, 7a, 20a-22a.

In so holding, the courts below are in direct conflict with decisions of the D.C. Circuit, *International Ass'n of Machinists & Aerospace Workers v. Trans World Airlines*, 839 F.2d 809 (D.C. Cir.), *amended on other grounds*, 848 F.2d 232 (D.C. Cir.), *cert. denied*, 488 U.S. 820 (1988) ("*TWA*"); the Ninth Circuit, *Regional Airline Pilots Ass'n v. Wings West Airlines, Inc.*, 915 F.2d 1399 (9th Cir. 1990) ("*Wings West*"); and the U. S. District Court for the District of Hawaii, *Union of Flight Attendants v. Air Micronesia, Inc.*, Civil No. 85-0125, unpublished slip op. (D.Hawaii Aug. 30, 1988), *aff'd*, unpublished slip op., Case No. 88-15754 (9th Cir. May 10, 1990) ("*Air Micronesia*").[3]

In addition, the Eleventh Circuit's decision acknowledges that Tampa could have made the changes in question before negotiations began. *See* App. 7a-8a. Given that concession, there is no reason under the RLA why Tampa could not have made the changes pending negotiations. The Eleventh Circuit, contrary to the RLA, substantially impairs carriers' ability to fulfill their common carrier obligations and grants veto power to newly certified unions by allowing such a union to block any change management seeks to make pending initial negotiations, no matter how economically necessary the change may be and without regard to the carrier's conduct at the negotiating table.

A. Statement of Facts

Tampa is a small cargo airline that does business in Miami, Florida. *See* App. 15a. On July 15, 1987,

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[3] *Air Micronesia* is reprinted at App. 36a-54a.

the International Association of Machinists and Aerospace Workers ("IAM") was elected to succeed the Teamsters Union ("Teamsters") as the exclusive bargaining representative for Tampa's fleet service employees. App. 2a, 16a. During the Teamsters' tenure, Tampa and the Teamsters never entered into a collective bargaining agreement. *See* App. 2a, 34a. A proposed agreement known as the "tentative agreement" existed, but the document was never finalized, ratified, or signed by either party. *Id.* The proposal did not preclude Tampa from changing employee pay, rules, and working conditions, and Tampa did so without any complaint from the Teamsters. App. 34a.

Tampa and the IAM began bargaining on October 2, 1987. App. 2a, 16a. During bargaining, Tampa informed the IAM that the "tentative agreement" contained existing rates of pay, rules, and working conditions. App. 2a. However, Tampa always retained the right to make unilateral changes, as it had done in the past. *See* App. 34a.

As Tampa's former General Manager stated in an affidavit:

> "The Company has always retained the right to manage its business and to make changes which its management deems appropriate in the conduct of its business. That right has never been relinquished or restricted by a collective bargaining agreement."

Id. The IAM did not controvert this affidavit.[4] Thus, the status quo included Tampa's right to make unilateral changes to meet its needs.

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[4] The Eleventh Circuit discounted the affidavit. *See* App. 2a

In May 1988, Tampa discharged several employees represented by the IAM without regard to previously extant seniority rules proposed in the tentative agreement and informed the IAM that, in keeping with past practice, there was no grievance procedure regarding the discharges. App. 3a, 16a. Tampa also discharged another employee who served as the IAM's shop steward. *Id.* The IAM filed this lawsuit thereafter alleging, *inter alia*, that Tampa breached its duty under section 2, First of the RLA, 45 U.S.C. § 152, First, "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions . . . ." *Id.*

Tampa and the IAM continued to negotiate in 1988 and 1989.[5] App. 3a, 32a-33a. They reached tentative agreement in whole or in part on 28 sections of an agreement. App. 33a. Pending negotiations, Tampa made other unilateral changes, such as curtailing dependent group medical coverage when costs rose, decreasing flight crews, increasing flights per day, laying off employees, and decreasing employee bonuses. *See* App. 3a, 16a-17a. The IAM amended its complaint to assail these changes. App. 3a.

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n.2. However, Tampa's past unilateral changes, which were made after the "tentative agreement" was prepared and without challenge from the Teamsters (App. 34a), constituted "actual objective working conditions or practices, broadly conceived. . . ." *See Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 153 (1969) ("*Detroit & Toledo*").

[5] Although both the Eleventh Circuit and the District Court claimed that Tampa refused to negotiate further in January 1989 (App. 3a, 16a), Tampa "has always been available on a reasonable basis to meet with and negotiate with the IAM." App. 33a.

B. Decisions Below

1. The District Court's Decision

The District Court exercised jurisdiction under 28 U.S.C. §§ 1331, 1337, and the RLA, and issued a preliminary injunction under section 2, First of the RLA. App. 17a, 25a-26a. The District Court's preliminary injunction ordered Tampa not to make further unilateral changes in pay, rules, or working conditions and required Tampa to restore certain prior changes and to engage in expedited arbitrations. App. 25a-26a.

The District Court acknowledged that *Williams* was "apparently binding," and that the D.C. Circuit held in *TWA* that a federal court could not enjoin an airline from making unilateral changes where no collective bargaining agreement was in force between the parties. App. 21a, 23a n.4. Nevertheless, the District Court justified its result by finding that *Williams* was substantially eroded by *Detroit & Toledo*. App. 22a. The District Court described *Detroit & Toledo* as holding that the status quo extends to actual, objective working conditions that need not be embodied in any existing agreement. *Id.*

The District Court also relied on *NLRB v. Katz*, 369 U.S. 736 (1962) ("*Katz*"), which involved unilateral changes made by an employer subject to the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* App. 24a. But, the District Court did not analyze or refer to the differences in the collective bargaining process under the NLRA and the RLA.

The District Court held that Tampa's unilateral changes were *per se* violations of section 2, First of the RLA. *See* App. 20a, 24a. The District Court did

not examine Tampa's conduct at the negotiating table or consider whether the changes were actually made by Tampa to undermine the IAM in any way.

2. The Eleventh Circuit's Decision

The Eleventh Circuit affirmed the District Court's ruling, even though the Eleventh Circuit quoted the statement in *Williams* that the RLA's status quo provisions were "aimed at preventing changes in working conditions previously fixed by collective bargaining agreements." App. 5a (quoting *Williams*, 315 U.S. at 403). The Eleventh Circuit acknowledged that *Williams* "might have required the opposite result in this case . . . ." App. 7a.

The Eleventh Circuit ruled against Tampa under section 2, First of the RLA by relying on *Detroit & Toledo*, although the Eleventh Circuit acknowledged that, unlike as in the instant case, there was a collective bargaining agreement in effect between the parties in *Detroit & Toledo*. App. 7a n.5. The Eleventh Circuit attempted to distinguish *TWA* by stating that, although unilateral changes were not enjoined in *TWA*, there was no prior collective bargaining agreement and no prior bargaining between the union and the carrier in that case. App. 9a. However, *TWA* does not limit its holding only to instances in which there was no prior bargaining *and* no prior agreement. *See* 839 F.2d at 814-15. *See also* App. 23a n.4 (District Court noted that "[t]he *TWA* court was concerned not with whether negotiations had commenced, but with whether there was a collective bargaining agreement in force when the changes were made."). The Eleventh Circuit did not explain why the fact that prior bargaining alone had occurred in the instant case was sufficient to enjoin Tampa's unilateral

changes except to cite *Detroit & Toledo*, a case that involved prior bargaining *and* a prior agreement.[6] App. 9a, 8a n.5. The Eleventh Circuit also adopted the holding and analysis of *Katz*, the NLRA case on which the District Court relied. App. 10a.

The Eleventh Circuit did state that *TWA* and *Wings West* "contain language which might be interpreted as supporting Tampa Airlines' position" that a federal court cannot enjoin unilateral changes pending negotiations. App. 11a. The Eleventh Circuit "respectfully disagree[d]" with those decisions. *Id.*

REASONS FOR GRANTING THE WRIT

A. The Circuits Are Split On The Fundamental Question Of Federal Labor Law Raised Herein; And, *TWA*, *Wings West*, And *Air Micronesia* Support Tampa's Position

There is a sharp split in the circuits regarding the circumstances in which a carrier may make unilateral changes when confronted with a newly certified union, and the proper scope of *Williams* after *Detroit & Toledo*. This Court should review the Eleventh Circuit's decision to resolve this inconsistency.

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[6] In addition, the Eleventh Circuit did not address the fact that, in *Williams*, the union asked to meet with the carrier *before* the unilateral change was made. 315 U.S. at 402. The Eleventh Circuit did not explain what it meant by the absence of prior bargaining. Under the Eleventh Circuit's decision, it appears that a carrier may make unilateral changes merely by doing so prior to actually attending the initial meeting with the union, conduct that is of a much different magnitude than Tampa's constant willingness to meet and negotiate with the IAM. *See* App. 33a.

The D.C. Circuit held in *TWA* that a carrier faced with a newly certified union can make unilateral changes, despite the provision in section 6 of the RLA concerning maintenance of the status quo, "in the absence of pre-existing, in place collective bargaining agreements." 839 F.2d at 814. Thus, contrary to the purported distinction relied upon by the Eleventh Circuit, the D.C. Circuit's holding in *TWA* is that unilateral changes are proper if there is no collective bargaining agreement in place, as is true in Tampa's case. *See id.*

With respect to section 2, First of the RLA and the duty imposed therein on carriers and unions to make and maintain agreements, the Eleventh Circuit's interpretation conflicts directly with the D.C. Circuit's construction of the same provision. In *TWA*, the D.C. Circuit held that a district court does not have jurisdiction under section 2, First to enjoin unilateral changes when, as in the instant case, all the RLA's procedures for negotiations, mediation, and a "cooling off" period have not been exhausted.[7] 839

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[7] The D.C. Circuit relied on limiting language in *Chicago and North Western Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 (1971) ("*Chicago and North Western*"), providing that a strike injunction under § 2, First may only be issued if it is "the only practical, effective means of enforcing the command of § 2, First," and in *Burlington Northern*, 481 U.S. at 446 and *International Ass'n of Machinists and Aerospace Workers v. Street*, 367 U.S. 740, 773 (1961) that "[c]ourts should hesitate to fix upon the injunctive remedy . . . unless that remedy alone can effectively guard the plaintiff's right." 839 F.2d at 814, 815. By contrast, the Eleventh Circuit found that the *Chicago and North Western* test was readily satisfied before the parties exhausted the RLA's procedures. App. 13a. Indeed, the Eleventh Circuit disagreed with the D.C. Circuit so deeply that the Eleventh

F.2d at 815. But, in the instant case, the Eleventh Circuit held that an injunction under section 2, First was proper even though the RLA's procedures had not been exhausted. App. 11a-13a. Thus, the D.C. Circuit and the Eleventh Circuit ruled very differently on these issues, and this Court should resolve the extreme differences between the two circuits.

The Eleventh Circuit's decision also conflicts with the Ninth Circuit's analysis in *Wings West*. In that case, the Ninth Circuit followed *TWA*'s conclusion, in reliance on *Williams* and *Chicago and North Western*, that "interjection of the federal courts in the bargaining process is not authorized by section 2, First . . . ." *Wings West*, 915 F.2d at 1403. The Ninth Circuit differed with the D.C. Circuit's *TWA* decision only in finding that, although jurisdiction exists, a claim is not stated under section 2, First when unilateral changes are made before negotiations had begun. *Wings West*, 915 F.2d at 1403.

In so holding, the Ninth Circuit rejected any reliance on *Katz*, the NLRA case that the Eleventh Circuit embraced. *Compare* App. 10a *with Wings West*, 915 F.2d at 1402. The Ninth Circuit noted that, unlike the NLRA, which provides for an administrative agency to oversee the bargaining process "with the authority to issue orders enforceable by federal courts to rectify unfair practices," the RLA did not establish such an agency and "[i]t is doubtful that Congress intended the federal courts to operate as the NLRB does under the detailed statutory prescriptions of the

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Circuit stated that an order enjoining self-help is more, not less, appropriate before the RLA's procedures are exhausted. App. 12a.

NLRA." 915 F.2d at 1402. The Ninth Circuit's approach in *Wings West* is, therefore, very different from the approach of the Eleventh Circuit, which was "persuaded" by *Katz* and made it dispositive of the issues under the RLA. *See* App. 10a.

Finally, the Eleventh Circuit's decision conflicts directly with the decision of U.S. District Judge Harold M. Fong in *Air Micronesia*, a case that presented facts very similar to the instant case. In *Air Micronesia*, the carrier made unilateral changes in flight attendant rates of pay, rules, and working conditions pending bargaining with a newly certified union. App. 38a-39a, 47a. No prior collective bargaining agreement between the carrier and the union existed, although they had bargained for several years. App. 37a, 47a-48a. Judge Fong held that the unilateral changes were permissible under *Williams* because, as in the instant case, there was no pre-existing collective bargaining agreement. App. 49a-50a, 51a. By contrast, the Eleventh Circuit's decision states that unilateral changes are permissible, despite *Williams*, only where there is no pre-existing agreement *and* no prior bargaining. App. 7a-8a.

This Court should resolve the stark conflict between the Eleventh Circuit's decision and *TWA*, *Wings West*, and *Air Micronesia*. The national transportation system needs a single interpretation of the RLA applied uniformly across the country, irrespective of the circuit in which a lawsuit happens to be brought.

B. The Eleventh Circuit Improperly Expanded *Detroit & Toledo* And Erroneously Adopted *Katz*'s NLRA Holding To Decide This RLA Case

1. The Eleventh Circuit Stretched *Detroit & Toledo* Beyond The RLA's Outer Limits

The Eleventh Circuit's decision acknowledged that *Detroit & Toledo* did not resolve a claim brought under the RLA provision at issue here, section 2, First, 45 U.S.C. § 152, First.[8] App. 7a n.6. In addition, the Eleventh Circuit conceded that *Detroit & Toledo* involved a pre-existing collective bargaining agreement, while there was no such executed and ratified agreement in the instant case. App. 7a n.5, 2a. *Detroit & Toledo*, also, did not involve a carrier bargaining with a newly certified union, as Tampa did in the instant case. *See* 396 U.S. at 143. Nevertheless, the Eleventh Circuit expanded *Detroit & Toledo* to cover the instant case. *See* App. 7a-8a.

This expansion by the Eleventh Circuit constitutes a fundamental error because this Court stated in

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[8] By contrast, the petitioners in *Williams* relied on, *inter alia*, section 2, First, and this Court declined to apply that provision to bar unilateral changes before a collective bargaining agreement is in effect. 315 U.S. at 399, 402-03. Although *Detroit & Toledo* stated that section 2, First together with the RLA's status quo provisions, 45 U.S.C. §§ 156, 155 Fifth, 160, form "an integrated, harmonious scheme . . . ." 396 U.S. at 152, the Eleventh Circuit wrote that 45 U.S.C. § 156, unlike section 2, First as construed by the same court, "may" bar unilateral changes only where there is a formal collective bargaining agreement in place. App. 7a n.5. Thus, the Eleventh Circuit reached its desired result by going well beyond *Detroit & Toledo* to hold that section 2, First alone bars unilateral changes in the absence of a written agreement, even though section 2, First is silent with respect to unilateral changes. *See id.*

Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n, 491 U.S. 490 (1989), that *Detroit & Toledo* "extended the relevant language of § 156 to its outer limits" and declined to extend the case further. 491 U.S. at 506. The Court limited *Detroit & Toledo* to the narrow holding that:

> "[T]he status quo provision [in the RLA] require[s] adherence not only to working conditions contained in express or implied agreements between the railroad and its union but also to conditions 'objectively in existence' when the union's notice [for renegotiation] was served . . . ."

Id.

The Eleventh Circuit held that *Detroit & Toledo* covers instances in which (1) there was never a collective bargaining agreement in place; and (2) the union that sought to lock in existing working conditions pending negotiations was not certified to represent the employees when the conditions were first put into effect. This Court should review the Eleventh Circuit's decision in light of its unwarranted expansion of *Detroit & Toledo*.

2. The Eleventh Circuit Erred By Importing *Katz*'s Holding Under The NLRA To Govern The RLA Because The Two Statutes Establish Very Different Regimes For Collective Bargaining

The Eleventh Circuit's decision cited this Court's statements that NLRA principles "cannot be imported wholesale into the railway labor arena . . ." and that "[e]ven rough analogies [between the NLRA and the RLA] must be drawn circumspectively . . . ." App. 9a-

10a (quoting *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969)). *See also Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 439 (1989). Yet, the Eleventh Circuit's decision imported *Katz*'s holding under the NLRA wholesale into the RLA. App. 10a. This is a fundamental error warranting this Court's review.

The Eleventh Circuit's decision did not recognize that the RLA and the NLRA establish very different collective bargaining processes. The RLA permits either party, once bargaining has begun, to invoke the mediation services of the National Mediation Board ("NMB"), which may also proffer its services *sua sponte*. 45 U.S.C. §§ 155, First, 156. Once the NMB's services are invoked, the parties must bargain under NMB mediation until the NMB decides in its discretion that mediation was unsuccessful and proffers binding arbitration to the parties. 45 U.S.C. § 155, First. *See also* 45 U.S.C. § 157. If either party declines the NMB's proffer of arbitration, a 30-day "cooling off" period is triggered. 45 U.S.C. § 155, First.[9]

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[9] If arbitration is rejected, and the dispute threatens to interrupt interstate commerce substantially, the NMB can notify the President, who may establish an emergency board to investigate and report on the dispute. 45 U.S.C. § 160. By contrast, the Labor Management Relations Act permits the President to obtain an injunction delaying a strike or lockout in an industry not subject to the RLA for just 80 days while a board of inquiry is reconvened, only upon finding that the national health or safety will be imperiled by a threatened or actual strike or lockout affecting an entire industry or substantial part thereof engaged in trade, commerce, transportation, transmission, or communications, among several states or with foreign nations,

As a result, the NMB can insist that the parties continue meeting indefinitely, without any meaningful review by a federal court. *See International Ass'n of Machinists and Aerospace Workers v. NMB*, 930 F.2d 45, 48-49 (D.C. Cir. 1991) (affirming refusal to order NMB to proffer arbitration after ten months of negotiations and 16 months of mediation); *Local 808, Building Maintenance, Service & R.R. Workers v. NMB*, 888 F.2d 1428, 1433-35, 38 (D.C. Cir. 1989) ("*Local 808*") (reversing injunction ordering NMB to proffer arbitration after ten months of negotiations and approximately two years of mediation); *International Ass'n of Machinists & Aerospace Workers v. NMB*, 425 F.2d 527, 538-43 (D.C. Cir. 1970) (same result after less than one month of negotiations and four months of mediation); *Lan Chile Airlines v. NMB*, 115 L.R.R.M. 3655, 3656 (S.D. Fla. 1984) (declining to order NMB to proffer arbitration after 16 months of mediation).[10] Collective bargaining under the RLA can be "an almost interminable process." *Detroit & Toledo*, 396 U.S. at 149.

The NLRA does not establish any such lengthy bargaining process overseen and managed by a federal

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or the production of goods for commerce. 29 U.S.C. §§ 176-180. *See also* R. Gorman, Labor Law—Basic Text Ch. 18, § 2 at 367-69 (1976).

[10] As the D.C. Circuit put it,

> "In no case cited by the parties to this case, and in none we can find, has a court ever ordered the National Mediation Board to terminate mediation and proffer arbitration .... Absent a showing of patent official bad faith, a court has no authority to review the [NMB's] decision to keep a dispute in mediation."

Local 808, 888 F.2d at 1433, 1434.

agency with the ongoing authority of the NMB. *See* 29 U.S.C. § 151 *et seq.* Even after *Katz*, an employer subject to the NLRA does not have to look forward to a "virtually endless" process before it may make unilateral changes. *Cf. Burlington Northern*, 481 U.S. at 444 (calling RLA process "virtually endless"). Under the NLRA, an employer may make unilateral changes equivalent to its last proposal once bargaining reaches what it considers to be "impasse," subject to subsequent review by the National Labor Relations Board ("NLRB") *only* if one party brings an unfair labor practice charge.[11] *See, e.g.*, 29 U.S.C. § 158(a)(5);

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[11] Indeed, in the Fifth Circuit, an employer subject to the NLRA may make unilateral changes even before impasse if the union was given prior notice of the changes and a reasonable opportunity to respond. *E.g., Nabors Trailers, Inc. v. NLRB*, 910 F.2d 268, 273 (5th Cir. 1990), *cert. granted*, No. 90-165, 59 U.S.L.W. 3735 (April 30, 1991); *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964). Moreover, some contractual terms, such as union security and dues check-off clauses, are not covered at all by *Katz* and may be altered upon contract expiration. *See Litton Financial Printing Division v. NLRB*, No. 90-285, 59 U.S.L.W. 4641, 4644 (June 11, 1991). Generally, an employer subject to the NLRA in an industry affecting commerce need only notify the union of the proposed modification or termination of an existing contract 60 days prior to its expiration, and must also notify the Federal Mediation and Conciliation Service ("FMCS") and any applicable state agency of the existence of a labor dispute within 30 days after notifying the union. 29 U.S.C. § 158(d). But, even with respect to terms covered by *Katz*, an employer may generally make unilateral changes under 29 U.S.C. § 158(d) once impasse is reached, so long as the collective bargaining agreement expired or 60 days passed after notice was given to the union, whichever is later (even if the FMCS or state agency was or is involved in seeking to mediate an agreement). 29 U.S.C. § 158(d)(4). The FMCS, completely unlike the NMB, may only use conciliation for "a

Katz, 369 U.S. at 741-43; *Bi-Rite Foods, Inc.*, 147 N.L.R.B. 59, 64-65 (1964). *See also* R. Gorman, Labor Law—Basic Text Ch. 20, § 12, at 443-444 (1976).

The Eleventh Circuit's decision ignores these very substantial differences in the collective bargaining process under the RLA vis-a-vis the NLRA and errs fundamentally in simply adopting *Katz*'s NLRA holding to decide this RLA case. This Court should grant review to consider whether the more lengthy RLA bargaining process carried out under the direct supervision of the NMB warrants permitting carriers subject to the RLA to make changes during bargaining with a newly certified union, particularly in the absence of any finding of actual bad faith as here.

C. The Eleventh Circuit's Distinction Between Permissible Changes Made Before Bargaining Begins, And Impermissible Changes Made Thereafter, But Before A Contract Is Reached, Conflicts With The RLA

The Eleventh Circuit's decision will make it much more difficult for carriers and newly certified unions to reach agreements because the decision gives newly certified unions veto power over changes that the carriers need to make while bargaining proceeds. Under the Eleventh Circuit's decision, a newly certified union can keep negotiating "almost interminab[ly]" and thereby prevent the carrier from making changes, even if the changes are necessary for the carrier to remain competitive. *See Detroit & Toledo*, 396 U.S. at 149. Because a central goal of the RLA is to encourage carriers and unions to reach agreements (*see*

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reasonable time," and the FMCS does not have any legal authority to decide when the parties may alter the status quo. *See* 29 U.S.C. § 173.

45 U.S.C. §§ 151a(4), 152, First), and because section 2, First does not address unilateral changes, much less create the distinction adopted by the Eleventh Circuit, this Court should review the Eleventh Circuit's decision.

A newly certified union whose employees have favorable rates of pay, rules, or working conditions will have no incentive in light of the Eleventh Circuit's decision to reach agreement at the bargaining table. Until the RLA's lengthy procedures are exhausted, a carrier would have to keep favorable practices in place. On the other hand, the Eleventh Circuit's decision gives a carrier no incentive to begin bargaining with a newly certified union. Until bargaining begins, the carrier can make unilateral changes. The Eleventh Circuit's decision, therefore, makes it much *less* likely that a carrier and a newly certified union will promptly reach agreement at the table, a result that is at odds with the RLA. *See* App. 4a ("The purposes of the [RLA] are facilitated by an elaborate statutory scheme designed to encourage negotiation and mediation rather than conflict resulting in the interruption of interstate commerce."). The Eleventh Circuit's decision does not encourage negotiation and mediation. Rather, the Eleventh Circuit, without any assessment of the parties' conduct in negotiations and before all the RLA's processes were allowed to run, virtually guarantees that newly certified unions will not agree to concessions until the RLA's procedures have been exhausted.

Moreover, in construing a federal statutory provision such as section 2, First, to determine what Congress intended, this Court deems clear statutory

language conclusive and turns to legislative history if the statutory language is unclear. *See, e.g., Toibb v. Radloff*, No. 90-368, 59 U.S.L.W. 4633, 4634 (June 11, 1991); *Blum v. Stenson*, 465 U.S. 886, 896 (1984). Section 2, First of the RLA is clear in that it says nothing about unilateral changes at all (much less changes made pending bargaining with a newly certified union). In addition, the Eleventh Circuit's decision does not cite any legislative history evidencing any intention by Congress, in enacting section 2, First, to bar such changes. In light of the Eleventh Circuit's departure from the statute's language, the absence of any analysis of legislative intent, and this Court's clear holding in *Williams*, this Court should review the Eleventh Circuit's decision.

CONCLUSION

The Eleventh Circuit's decision will significantly impair labor relations between newly certified unions, airlines, and railroads. The Eleventh Circuit's decision conflicts with decisions in other circuits, misreads prior decisions of this Court, and adopts a rule of law that is not present in the language Congress used in section 2, First of the RLA.

For all of the foregoing reasons, Transportes Aereos Mercantiles Pan Americanos, S.A., a/k/a Tampa Airlines respectfully requests that this Court grant this petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; District 100, International Association of Machinists and Aerospace Workers,
Plaintiffs-Appellees,

v.

TRANSPORTES AEREOS MERCANTILES PAN AMERICANOS, S.A., a/k/a Tampa Airlines,
Defendant-Appellant.

No. 89-5912

**United States Court of Appeals,
Eleventh Circuit**

February 27, 1991

**Appeal from the United States District Court
for the Southern District of Florida**

Before HATCHETT and ANDERSON, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

ANDERSON, Circuit Judge:

Appellant Transportes Aereos Mercantiles Pan Americanos, S.A., a/k/a Tampa Airlines ("Tampa Airlines") appeals from the district court's order granting a preliminary injunction in favor of appellees International Association of Machinists and Aerospace Workers ("IAM") and

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

District 100, IAM. Relying on § 2 First of the Railway Labor Act ("RLA"), 45 U.S.C. § 152 First, the district court enjoined Tampa Airlines from making unilateral changes in working conditions during negotiations directed toward reaching a collective bargaining agreement. The district court also ordered that Tampa Airlines restore the working conditions to the status quo before certain unilateral changes were made. Appellant argues that the district court misapplied the Railway Labor Act and its attendant case law and that the injunction was an inappropriate remedy.

I.

The district court found the following undisputed facts after conducting a hearing. On July 15, 1987, appellee IAM was elected to succeed the Teamsters Union as the exclusive bargaining representative for the fleet service employees of appellant Tampa Airlines.[1] During the Teamsters' tenure as the employees' representative, collective bargaining had produced a tentative agreement regarding rates of pay, rules, and working conditions. Although that agreement was never finalized or ratified, Tampa Airlines informed IAM, at the October 2, 1987 commencement of bargaining between IAM and Tampa Airlines, that such agreement contained the existing rates of pay, rules, and working conditions, *i.e.*, the status quo.[2]

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[1] Tampa Airlines is a common carrier by air as defined by the Railway Labor Act, 45 U.S.C. §§ 151, 181.

[2] Tampa Airlines defines the status quo as "that rates of pay, rules and working conditions were changed by management at its discretion to meet Tampa's needs." Brief of Appellant at 4 and 11 (relying on Affidavit of Rodrigo Arboleda, R1-27-5). A reading of the proffered affidavit reveals that the affiant stated only that management had not bound itself not to make unilateral changes by a collective bargaining agreement and that management had made certain unspecified changes after reaching the tentative agreement with the Teamsters. Tampa Airlines does not contend, however, that the district court's finding

In May, 1988, Tampa Airlines fired several union employees without regard to previously extant seniority rules and informed the union that there was no grievance procedure in existence to challenge the firings. District Court Order, R1-32-3. Also in May, 1988, management fired the shop steward, allegedly on the grounds that, although he was a good employee, his position with the union would not be tolerated and that management would not respect the union or its members' rights.

IAM responded by filing the instant action alleging bad faith on the part of Tampa Airlines in connection with the ongoing collective bargaining negotiations. Despite the onset of litigation, collective bargaining continued until January, 1989, when Tampa Airlines refused to negotiate further with IAM. Tampa Airlines subsequently made additional unilateral changes, including stopping without notification contributions to the employees' dependent group medical insurance coverage, decreasing certain employee bonuses, decreasing flight crews, increasing flights per day, and laying off more employees. IAM amended its complaint to encompass these additional changes.

II.

In 1926, Congress enacted the Railway Labor Act, 45 U.S.C. §§ 151-188, for the following stated purposes:

> (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of as-

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that management had informed IAM that the unratified agreement represented the existing conditions was in error. Therefore, we accept the district court's definition of the status quo.

In addition, as the district court noted, "[t]here were two provisions of the unratified agreement that the union admits were not part of the rates of pay, rules and working conditions . . . : the union security clause and the dues checkoff clause." R1-32-3 at n.1. Those provisions are not at issue here.

> sociation among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 151a.

The purposes of the act are facilitated by an elaborate statutory scheme designed to encourage negotiation and mediation rather than conflict resulting in the interruption of interstate commerce. Essential to this scheme is the duty to bargain in good faith codified in § 2 First of the Act, 45 U.S.C. § 152 First, providing that:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 2 First is not merely hortatory; it imposes judicially enforceable legal obligations. *See Chicago & North Western Ry. Co. v. United Transport Union*, 402 U.S. 570, 91 S. Ct. 1731, 29 L. Ed. 2d 187 (1971). Furthermore, the Supreme Court has held that § 2 First, together with other provisions of the Railway Labor Act, "form an in-

tegrated, harmonious scheme for preserving the status quo from the beginning of the major dispute[3] through the final 30-day 'cooling-off' period." *Detroit & Toledo Shore Line Ry. Co. v. United Transportation Union*, 396 U.S. 142, 152, 90 S. Ct. 294, 300, 24 L. Ed. 2d 325 (1969).

The question presented here is whether the obligation to bargain in good faith of § 2 First precludes management from making unilateral changes in working conditions after the onset of negotiations directed toward adoption of an initial collective bargaining agreement. Tampa Airlines asserts that it does not, at least in the absence of a pre-existing collective bargaining agreement. In light of the history of prior collective bargaining between the parties, and notwithstanding the fact that there was no prior collective bargaining agreement in effect, we conclude that the district court properly restored the status quo and enjoined Tampa Airlines from making future unilateral changes.

In *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 403, 62 S. Ct. 659, 669, 86 L. Ed. 914 (1942), the Supreme Court declared that the Railway Labor Act's status quo provisions were "aimed at preventing changes in working conditions previously fixed by collective bargaining agreements." In other words, "pending . . . negotiations, where no collective bargaining agreements are or have been in effect, the carrier" is free to make unilateral changes. *Id.* at 402, 62 S. Ct. at 669. However, the Supreme Court severely circumscribed the *Williams* holding in *Detroit & Toledo Shore Line Ry. Co. v. United Transportation Union*, 396 U.S. 142, 90 S. Ct. 294, 24 L. Ed. 2d 325 (1969).

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[3] The district court properly classified the instant case as a major dispute. R1-32-5 (citing *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945)). This determination is not at issue on appeal. For a good discussion of the distinction between major and minor disputes under the Railway Labor Act, *see generally Sheet Metal Workers' Intern. Ass'n. v. Burlington No. Ry. Co.*, 893 F.2d 199, 202-04 (8th Cir. 1990).

In *Detroit & Toledo*, the Court held that the status quo provisions obligate both union and management to maintain not only the working conditions contained in an existing collective bargaining agreement, but also "those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Id.* at 153, 90 S. Ct. at 301. The Court added: "[C]learly these conditions need not be covered in an existing agreement." *Id.* The rationale for this holding is that if management is permitted to resort to self-help before exhaustion of the Act's negotiation and mediation procedures, "the union cannot be expected to hold back its own economic weapons, including the strike." *Id.* at 155, 90 S. Ct. at 302. In addition, "[u]nilateral changes made while the employees' representative is seeking to bargain . . . interfere with the normal course of negotiations by weakening the union's bargaining position." Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1423 (1958).

In *Detroit & Toledo*, the union invoked § 6 of the Act, 45 U.S.C. § 156,[4] which, along with § 5 First and § 10, 45

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[4] 45 U.S.C. § 156 states:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon

U.S.C. §§ 155 First, 160, comprises the status quo portion of the Act. *Detroit & Toledo* at 150-51, 90 S. Ct. 299-300. In this appeal, however, none of these three provisions has been invoked.[5] This raises a question specifically left open by *Detroit & Toledo*: whether § 2 First's duty to bargain in good faith, standing alone, precludes unilateral changes after negotiations have commenced.[6] We conclude that it does.

Although the *Williams* holding by itself might have required the opposite result in this case, *Detroit & Toledo* has limited *Williams'* allowance of unilateral changes to the narrow situation where there is "absolutely no prior history of any collective bargaining *or* agreement between the parties on any matter." *Detroit & Toledo*, 396 U.S. at 158, 90 S. Ct. at 303 (emphasis added). In the instant case, collective bargaining between the Teamsters and

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as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

[5] IAM requested relief under both § 2 First and § 6 in their original complaint, but has relied on § 2 First alone on this appeal. It is questionable whether § 6 could be properly invoked here because § 6 may only apply where there is an intended change in an existing, formal collective bargaining agreement. *Detroit & Toledo* involved a situation where there was such an agreement and the Court held that once § 6 is invoked, the status quo that must be maintained includes not only what is in the existing agreement, but also the actual working conditions in place, even if those conditions fall outside of the existing agreement. We need not decide whether the tentative agreement reached by management and the Teamsters in the instant case is an agreement within the meaning of § 6 because, as discussed below in text, we conclude that § 2 First precludes the unilateral changes made here despite the lack of a formal agreement in light of the history of prior collective bargaining between the parties.

[6] In *Detroit & Toledo*, the union argued that the railroad violated the duty to bargain in good faith. The Court declined to reach that argument because it resolved the case on the basis of § 6. *Detroit & Toledo*, 396 U.S. at 155 n.23, 90 S. Ct. at 302 n.23.

Tampa Airlines as well as bargaining involving IAM had already occurred at the time that Tampa Airlines made the unilateral changes at issue. Furthermore, at the time that bargaining commenced, Tampa Airlines informed IAM that the prior, unratified agreement represented the status quo. Because there was a prior history of collective bargaining here, this case does not fall within *Williams* small window of remaining vitality.[7]

Having concluded that the instant case is not controlled by *Williams*, as the holding of that case was narrowed in *Detroit & Toledo*, we next conclude that the rationale of *Detroit & Toledo*, combined with *Chicago & North Western's* holding that § 2 First provides for enforceable legal duties, precludes the unilateral changes made here. In *Detroit & Toledo*, there was a pre-existing collective bargaining agreement to serve as a stepping stone for an injunction defining the status quo as broader than that agreement, *i.e.*, to encompass the actual conditions in place not covered by the agreement. Although here there was no prior formal collective bargaining agreement, the instant case implicates the identical policies behind the *Detroit & Toledo* holding. If management is permitted to make unilateral changes in working conditions during collective bargaining, the union's position will be undermined, interruptions to interstate commerce are likely to occur, and the purposes of the Act will be frustrated.

Tampa Airlines relies on *International Ass'n. of Machinists & Aerospace Workers (IAM) v. Trans World Airlines*, 839 F.2d 809 (D.C. Cir.), *amended on other grounds*, 848 F.2d 232 (D.C. Cir.), *cert. denied*, 488 U.S. 820, 109 S. Ct. 62, 102 L. Ed. 2d 40 (1988) for the proposition that there must be a prior collective bargaining agreement be-

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[7] In fact, the *Detroit & Toledo* case questioned whether *Williams* has any remaining vitality. *Detroit & Toledo* at 158, 90 S. Ct. at 303. Because there was prior collective bargaining in this case, we need not address the continuing validity of *Williams*.

fore management can be enjoined from unilaterally changing working conditions. In that case, the court held only that "*Williams* . . . [is] binding in a case like this one before us where there has been 'absolutely no prior history of any collective bargaining or agreement between the parties on any matter.' " *IAM v. Trans World Airlines* at 814 (quoting *Detroit & Toledo*, 396 U.S. at 158, 90 S. Ct. at 303). We note that the D.C. Circuit apparently believed that the facts before it fell squarely within the remaining *Williams* window of vitality, *i.e.*, no prior collective bargaining and no prior agreement. Because there was prior collective bargaining in this case, the D.C. Circuit case is distinguishable. We reject Tampa Airlines' argument that there must be a prior collective bargaining agreement before management can be enjoined from unilaterally changing working conditions. *Williams* was expressly limited by *Detroit & Toledo* to a situation where there is not only no pre-existing agreement, but also no history of collective bargaining.[8]

Our interpretation of the Railway Labor Act's duty to bargain in good faith is also supported by an analogy to cases interpreting the National Labor Relations Act (NLRA), 29 U.S.C. § 141, *et seq.* and its duty to bargain in good faith. *See* 29 U.S.C. § 158. Although we realize that the NLRA "cannot be imported wholesale into the railway labor arena . . ." and that "[e]ven rough analogies

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[8] The Ninth Circuit, apparently reading the D.C. Circuit's *IAM v. Trans World Airlines* case as does Tampa Airlines, said: "We . . . differ with the D.C. Circuit in that . . . [o]ur view is that jurisdiction exists to enforce section 2, First through Fourth, but that the prerequisites for stating a claim under authority of *Chicago & N.W. Ry.* do not exist under the facts of this case where there has been no negotiation process instituted at all." *The Regional Airline Pilots Ass'n. v. Wings West Airlines, Inc.*, 915 F.2d 1399, 1403 (9th Cir. 1990). Thus, the Ninth Circuit appears to be in accord with our holding that unilateral changes in working conditions can be enjoined where there has been prior bargaining.

must be drawn circumspectively . . . ," *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383, 89 S. Ct. 1109, 1118, 22 L. Ed. 2d 344 (1969), an analogy is appropriate in this instance because both the RLA and the NLRA require the same 'good faith' bargaining. *Norfolk & Portsmouth Belt Line Ry. Co. v. Brotherhood of Railway Trainmen*, 248 F.2d 34, 45 n.6 (4th Cir. 1957), *cert. denied*, 355 U.S. 914, 78 S. Ct. 343, 2 L. Ed. 2d 274 (1958) (citing *Brotherhood of Railway Trainmen v. Toledo, Peoria & Western Railroad*, 321 U.S. 50, 64 S. Ct. 413, 88 L. Ed. 584 (1944)). As the Supreme Court noted in *Chicago & North Western*, 402 U.S. at 574-75, 91 S. Ct. at 1734, the RLA's and the NLRA's duty to bargain in good faith are based on the same underlying policy: existing rates of pay, rules, and working conditions must be maintained during negotiations because "[t]he bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition" of the union as the bargaining representative.

Drawing on this analogy with the NLRA, we are persuaded by the Supreme Court's reasoning in *N.L.R.B. v. Katz*, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962), a case interpreting the NLRA's to bargain in good faith. In *Katz*, the Court held, in a situation where there was no prior collective bargaining agreement between management and the union, that "an employer's unilateral change in conditions of employment under negotiation is [as much a violation of the duty to bargain in good faith] as . . . a flat refusal [to negotiate]." *Id.* at 748, 82 S. Ct. at 1111. Similarly, we hold that Tampa Airlines violated the RLA's duty to bargain in good faith when it unilaterally changed existing working conditions after collective bargaining negotiations with IAM had begun.

III.

Tampa Airlines argues that, even if it has violated RLA § 2 First's duty to bargain in good faith, the district court improperly granted injunctive relief. Tampa Airlines contends that "injunctive relief under RLA § 2 First [§ 152 First] is available only if *all* the procedures for negotiations, mediation and 'cooling off' period have been unsuccessfully utilized . . . ." Brief of Appellant at 24 (emphasis in original) (quoting *International Ass'n. of Machinists & Aerospace Workers (IAM) v. Trans World Airlines*, 839 F.2d 809 (D.C. Cir. 1988)).

Although it is true that "[c]ourts should hesitate to fix upon the injunctive remedy . . . unless that remedy alone can effectively guard the plaintiff's right," *IAM v. Trans World Airlines*, 839 F.2d at 815 (quoting *Burlington Northern R.R. v. BMWE*, 481 U.S. 429, 446, 107 S. Ct. 1841, 1851, 95 L. Ed. 2d 381 (1987) (quoting *IAM v. Street*, 367 U.S. 740, 773, 81 S. Ct. 1784, 1802, 6 L. Ed. 2d 1141 (1961)), we are not persuaded by the argument that an injunction should not issue unless the very procedures that are being undermined by the unilateral changes are exhausted. Without enjoining future unilateral changes and restoring the prior conditions, the very procedures that Tampa Airlines suggests must be first pursued will be undermined.

Both *IAM v. Trans World Airlines*, 839 F.2d at 815, and the Ninth Circuit's opinion in *Regional Airline Pilots Ass'n. v. Wings West Airlines, Inc.*, 915 F.2d 1399 (9th Cir. 1990) contain language which might be interpreted as supporting Tampa Airlines' position that an injunction cannot issue until all RLA procedures have been exhausted. To the extent that those cases so hold, we respectfully disagree. Such a position would be a misapplication of *Chicago & North Western*. Nothing in that opinion suggests a rule that an injunction should issue only after all RLA procedures are exhausted. Rather, *Chicago & North West-*

ern merely held that a strike injunction should issue only where it is the only "practical, effective means of enforcing the duty to exert every reasonable effort to make and maintain agreements . . . . " *Chicago & North Western*, 402 U.S. at 583, 91 S. Ct. at 1738.

In fact, the rule suggested by Tampa Airlines is inconsistent with important policies underlying the RLA. It is well established that the RLA is designed to preserve the status quo and to discourage resort to self-help during the time that the RLA procedures are being pursued; thereafter, resort to self-help is generally permissible. Thus, contrary to the rule urged by Tampa Airlines, an order enjoining self-help is more appropriate, not less appropriate, before all of the RLA procedures are exhausted.[9]

The test established in *Chicago & North Western*, 91 S. Ct. at 1738, for determining whether to enjoin the unilateral changes is whether an injunction is the only practical, effective means of enforcing the duty to bargain in

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[9] If, as Tampa Airlines and the D.C. Circuit suggest, *Chicago & North Western* provided support for the proposition that an injunction is appropriate only after all RLA procedures have been exhausted, then *Chicago & North Western* would be inconsistent with the above-mentioned policies underlying the RLA. However, a careful reading of *Chicago & North Western* reveals that there is no such inconsistency. The Supreme Court did note early in their opinion that "[f]or present purposes it is sufficient to observe that the parties have exhausted the formal procedures of the Railway Labor Act . . . . " *Chicago & North Western*, 91 S. Ct. at 1733. However, the court later remarked, after holding that § 2 First imposes a legal obligation on the parties, that the union went "through the motions [of the RLA procedures] with 'a desire not to reach an agreement' " *Id.* at 1736 (citation omitted). Thus, in *Chicago & North Western*, the RLA procedures had not been exhausted, *i.e.*, the RLA procedures had not been performed in conformity with § 2 First's duty to bargain in good faith. Therefore, *Chicago & North Western* provides no support for the rule proposed by Tampa Airlines, not only for the reasons stated in the text, but also because that case did not present a situation where all of the RLA procedures, including § 2 First, had been exhausted.

good faith expressed in § 2 First. In *Chicago & North Western*, the unilateral action sought to be enjoined was a strike, thus triggering the prohibition against strike injunctions found in the Norris-Laguardia Act, 29 U.S.C. § 104(a). We need not decide whether a less restrictive test should apply in the instant case, which does not involve a strike injunction, because the *Chicago & North Western* test is readily satisfied here. In the instant case, we have held that Tampa Airlines has not exerted reasonable efforts to bargain in good faith. Since the unilateral changes made by Tampa Airlines will inevitably undermine IAM's bargaining position, we cannot conclude that other remedies, short of an injunction, would be effective. During the course of bargaining and after refusing to bargain further with IAM, Tampa Airlines fired numerous employees and unilaterally made changes in working conditions, including changes involving several significant fringe benefit programs. Such action by Tampa Airlines could only serve to undermine the union members' confidence in IAM, their bargaining representative, and to undermine the ability of IAM to bargain on a fair and equal basis with management. Under these circumstances, it was entirely appropriate for the district court to fashion an injunction so that fair negotiations could continue under the RLA procedures. Any collective bargaining agreement that might result from further negotiations in the absence of an injunction would almost surely be the product of decreased union bargaining strength. Thus, an injunction is the only practical and effective remedy here.

Therefore, the district court's order enjoining further unilateral changes and restoring the conditions that existed before Tampa Airlines made such changes is **AFFIRMED**.[10]

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[10] At oral argument, Tampa Airlines also argued that the district court erred in failing to fix a bond. We conclude that Tampa Airlines did not fairly present this issue in its brief, and therefore we decline to address it.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-1935-CIV-HOEVELER

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS and DISTRICT 100, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Plaintiffs,

vs.

TRANSPORTES AEREOS MERCANTILES PAN AMERICANOS, S.A., a/k/a TAMPA AIRLINES,

Defendant.

Filed August 4, 1989
Robert M. March
Clerk, U.S. District Court
for the Southern District of Florida—Miami

PRELIMINARY INJUNCTION

THIS CAUSE having come on to be heard before me in open Court on June 9, 1989, pursuant to the IAM's Verified Amended Complaint for Bad Faith Bargaining, Anti-Union Animus and Interference with IAM Designated Representatives, all in violation of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and having reviewed the affidavits and pleadings, in particular, those dealing with Motions for temporary or preliminary relief, and further having

heard argument of counsel and reviewing briefs and arguments submitted, this Court now makes the following Findings of Fact, Conclusions of Law and enters its Order accordingly.

FINDINGS OF FACT

1. The Plaintiffs herein are labor organizations as defined under the Railway Labor Act (RLA). The International Association of Machinists and Aerospace Workers, AFL-CIO (IAM) is the exclusive bargaining representative for the fleet service employees of Transportes Aereos Mercantiles Pan Americanos, S.A., a/k/a Tampa Airlines. District 100 of the IAM is a duly established and chartered district lodge of the IAM and is a delegate body made up of representatives duly elected from local lodges within the air transport system industry or locality in which District 100 is established.

2. District 100 has the duty of servicing members of the various local lodges under its jurisdiction by securing mutual protection, negotiating agreements and/or contracts and policing the same with ultimate authority to resolve grievances or bring the same to arbitration for final and binding effect; and, if further needed, to bring whatever actions are necessary on behalf of the membership of the local lodges which it directly represents. In this matter, District 100, on behalf of the IAM, is the servicing agent for the said fleet service employees of Tampa Airlines.

3. The Defendant, Tampa Airlines, is a common carrier by air as defined by the RLA, 45 U.S.C. §§ 151 and 181, *et seq.*, respectively. Tampa Airlines is authorized to do business within the State of Florida and has been and continues to date to do business in Miami, Dade County, Florida.

4. The employees of Tampa Airlines, previously represented by the Teamsters Union, elected the IAM as their bargaining representative on July 15, 1987.

5. On October 2, 1987, the union and the airline commenced bargaining over a new collective bargaining agreement. At that time, the airline informed the union that the existing rates of pay, rules and working conditions were contained in an unratified agreement between the airline and the Teamsters.[1]

6. In May, 1988, the airline fired several union employees without regard to previously extant seniority rules and informed the union that there was no grievance procedure in existence.

7. Also in May, 1988, the airline traffic manager informed the shop steward that although he was a good employee, his position with the union would not be tolerated. Moreover, the manager informed the shop steward that the airline would not respect the union, its members or its rights.

8. The union filed its original complaint on October 7, 1988, alleging bad faith bargaining based on unilateral changes in working conditions during the period subsequent to the IAM being certified as the union bargaining representative.

9. In January of 1989, the airline refused to engage in further bargaining with the union.

10. In the spring of 1989, the airline cancelled the employees' dependent group medical insurance without first notifying the union or subsequently permitting discussion

[1] There were two provisions of the unratified agreement that the union admits were not part of the rates of pay, rules and working conditions, however: the union security clause and the dues checkoff clause. With those two exceptions, the union maintains that the unratified contract embodied that status quo.

on the subject. At the same time, the airline also decreased the employees' rights to bonus benefits, decreased flight crews and increased flights per day, and laid off more employees.

11. Based upon all of the above, the Plaintiffs then sought the assistance of this Court by filing an Amended Complaint, Motion for Temporary Restraining Order and/or Preliminary or Permanent Injunction, together with affidavits and supporting exhibits which, in part or in whole, established all the above aforementioned Findings of Fact.

12. Any of the above Findings of Fact which may be deemed Conclusions of Law are to be treated as such.

Having entered the above Findings of Fact, the Court now enters its Conclusions of Law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, pursuant to 28 U.S.C. § 1331 (Federal Question) and 28 U.S.C. § 1337 (Acts of Congress Regulating Commerce).

2. This Court further finds it has proper jurisdiction to consider and maintain this action and to render the following decisions and orders as the subject matter herein alleges violations of § 2, First, of the Railway Labor Act. Additionally, this Court finds that the subject matter herein may also be termed to be a "major dispute". A "major dispute" has been well defined in the case of *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711 (1945) as one which arises from the making of new contracts or for changes of existing contracts.

3. The RLA, 45 U.S.C. § 151, *et seq.* was enacted in 1926 to encourage collective bargaining by railroads and the employees representatives in order to prevent, if possible, interruptions to interstate commerce. *Texas & N.O.R.*

Co. v. Railway Clerks, 281 U.S. 548 (1930); *Detroit & Toledo Shore Line R.R. Co. v. United Transportation Union*, 396 U.S. 142 (1962).

4. The purposes of the Act are set forth in Section 2, 45 U.S.C. § 151a:

> "The purposes of the chapter are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions."

5. These delineated purposes are not merely guidelines. They have been codified into the Act. Section 2, First, 45 U.S.C. § 152 First of the Act states that

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to *make and maintain agreements concerning rates of pay, rules, and working conditions*, and to settle all disputes, *whether arising out of the application of such agreements or otherwise*, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

6. This statutory pronouncement is the heart of the RLA and, accordingly, is a right legally enforceable by the courts in and of itself. *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969); *Chicago & North Western Ry. Co. v. United Transportation Union*, 402 U.S. 570 (1971).

7. The present case involves Section 2 First of the Railway Labor Act, commonly referred to as the duty to bargain in good faith, which requires the parties to exert every reasonable effort to meet, make and maintain agreements concerning rates of pay, rules and working conditions. The duty to exert every reasonable effort to make and maintain agreements under the RLA has been judicially held to be identical to the duty to bargain in good faith mandated by Section 8 of the National Labor Relations Act (hereinafter NLRA), 29 U.S.C. § 151, *et seq.*, which makes it an unfair labor practice for either the employer or labor organization to bargain collectively in bad faith. *Norfolk & P.B.L.R. Co. v. Brotherhood of Railroad Trainmen*, 248 F.2d 34, 45 fn. 6 (4th Cir. 1957); *IAM v. National Ry. Labor Conf.*, 310 F. Supp. 905 (D.D.C. 1970); *American Airlines, Inc. v. Air Lines Pilots Ass'n Int'l.*, 169 F. Supp. 777 at 793, 794 (S.D.N.Y. 1958).[2]

8. Although some violations of the duty to bargain in good faith require a subjective finding of bad faith by a party, there are certain bad faith bargaining violations

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[2] The United States Supreme Court in several decisions has permitted courts to turn to the NLRA precedents for guidance in interpreting obligations under the RLA. Although analogies between the two acts should be drawn with care and with awareness of the differences between the statutory schemes, the parallels between § 2 First of the RLA and § 8 of the NLRA, 29 U.S.C. § 158, have previously been established by the courts to the extent that the obligations of those two sections regarding good faith bargaining have been held to be identical. *TWA, Inc. v. Flight Attendants*, ___ U.S. ___ (February 28, 1989); *Chicago & Northwestern, supra*; *Jacksonville Terminal, supra*; *National Ry. Labor Conf., supra.*

which do not require a subjective finding, they are *per se* violations. Included among these *per se* violations of the duty to bargain in good faith are the employer's unilateral changes in the terms and conditions of employment while the parties are in the process of negotiating a collective bargaining agreement. *NLRB v. Katz*, 369 U.S. 736 (1962). The *Katz* case, which this Court finds to be persuasive in the present dispute, involved a newly certified union's attempt to negotiate its first collective bargaining agreement with the employer. The employer, during negotiations, unilaterally changed certain terms and conditions of employment without agreement by the union. The employer's unilateral changes during this critical time period were deemed *per se* violations of the duty to bargain in good faith and the employer was ordered to restore the working conditions which existed prior to its unlawful actions. The rationale for unilateral changes in rates of pay, hours and working conditions being violations of the duty to bargain in good faith without requiring a finding of subjective bad faith, lies in the fact that the institution of unilateral changes circumvents the employer's duty to negotiate which frustrates the basic policies which underpin collective bargaining. See *Katz*, *supra* at 743, 747; *Seattle-First Nat. Bank v. NLRB*, 638 F.2d 1221, at 1227 (1981).

As in Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401:

> "Unilateral action yields to much the same analysis. When taken during negotiations or upon subjects on which the union wishes to bargain it weakens the union by showing the employees that it is useless to try to negotiate. If the employer unilaterally raises wages or makes some other concession, his conduct effectively tells the employees that without collective bargaining they can secure advantages as great as, or possibly greater than, those the union can secure. Unilateral changes made while the employee's rep-

> resentative is seeking to bargain also interfere with the normal course of negotiations by weakening the union's bargaining position. Consequently, proof that an employer changed wages, rates or other terms of employment in the midst of contract negotiations ordinarily gives rise to the inference that he had no intention of coming to an agreement; the factual inference can be negated by showing that there was a need for immediate action or by proving that the negotiations had reached an impasse."

This rationale pertaining to bad faith bargaining under the NLRA has been cited with approval by the Supreme Court and made applicable to cases under the RLA. See *Chicago & North Western, supra* at 575 (" . . . The bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition.")

9. When there is a violation of the duty to bargain in good faith, the RLA compels the parties to revisit each tainted step so as to enforce the purposes and requirements of the Act. *Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937); *Chicago & North Western Ry. Co.*, 471 F.2d 366 (7th Cir. 1971); *cert. denied*, 93 S. Ct. 965 (1973).

10. The Supreme Court's apparently binding decision in *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942), was disemboweled by subsequent case law. In *Williams*, the Court held that in the absence of a collective bargaining agreement, there is no prohibition against unilateral action. There, railroad employees known as "red caps" were protesting the unilateral decision by their employer to withhold tips from wages, a decision made subsequent to unionization and collective bargaining but prior to ratification of an agreement.

Although not directly overruled, *Williams* has been substantially eroded by *The Detroit and Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 143 (1969). There, the railroad contended that the status quo to be maintained was only that of working conditions embodied in the parties' existing collective bargaining agreement. *Id.* The union, on the other hand, contended—as does the union in the instant case—that the conditions to be preserved were the actual working conditions out of which the dispute arose, irrespective of the existence of a collective agreement. *Id.* at 144. The Supreme Court held that the status quo extends to "those actual, objective working conditions out or which the dispute arose, and clearly these conditions need not be covered in an existing agreement." *Id.* at 153. Thus, applying the Court's reasoning to the instant facts, it would appear that the existence of a collective bargaining agreement is immaterial to the requirement that neither party take unilateral action during the course of dispute resolution to alter the status quo.[3]

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[3] Although the union in *Shore Line R.R.* brought the action under the disputes procedures of section 6 of the Act, the Court's reasoning applies to any of the three status quo provisions of the Act. *Shore Line R.R.*, 396 U.S. at 152. The Court held that the intent and effect of each of the status quo provisions is identical. *Id.* The reason the Court gave for its rationale is that "these provisions, together with section 2 First, form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day 'cooling-off' period." *Id.* Thus, whichever of the status quo provisions is in dispute is irrelevant to the interpretation of the status quo requirements.

At the hearing, the union argued at length that it was not seeking relief under section 6 of the Act, 45 U.S.C. section 156, but under section 2 First, 45 U.S.C. section 151a. Because the intent and effect of these status quo provisions is identical, however, they must be interpreted harmoniously. Therefore, in the instant case it is immaterial, for the purpose of interpreting the scope of the status quo provisions, which section of the Act is at issue.

Williams, however, has been cited as binding precedent precluding injunctive relief for an airline union—the same union as in the instant case—where the employer airline instituted unilateral changes in working conditions while engaged in collective bargaining. *International Ass'n of Machinists & Aerospace Workers v. Trans World Airlines, Inc.*, 839 F.2d 809 (D.C. Cir. 1988). Although the D.C. Circuit acknowledged that *Williams* had been eroded by subsequent case law, primarily by *Shore Line R.R.*, it nevertheless held that because *Williams* has never been directly overruled, it remains binding precedent.[4] *IAM v. TWA*, 839 F.2d at 814-15. This court chooses to be bound by the reasoning and intent of the more recent Supreme Court opinions which have recognized that neither party should take unilateral action to alter the status quo during the course of dispute resolution.

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[4] In the *TWA* case, the union initially sought to retroactively restore working conditions to those that existed on the date on which IAM was certified as the bargaining representative, and to enjoin prospective unilateral changes. *IAM v. TWA*, 839 F.2d at 810. The district court refused to roll back the unilateral changes, although it did enjoin prospective changes. *Id* at 812. Because the roll back determination was unchallenged on appeal, the circuit court did not reach that issue; it did, however, reverse the lower court's order enjoining prospective changes. *Id.* at 812, 815. The D.C. Circuit held that where no collective bargaining agreement was in force between the parties, the status quo provisions of the RLA do not prohibit unilateral action. *IAM v. TWA*, 839 F.2d at 815.

The union argues that *TWA* is factually distinguishable from the instant case. In *TWA*, the airline changed conditions prior to commencement of bargaining. In the instant case, the union contends that conditions were changed after bargaining commenced. Thus, the union argues, while in the *TWA* case there were other means of vindicating the purposes of the act, here there are none. The union's argument, however, reaches too far. The *TWA* court was concerned not with whether negotiations had commenced, but with whether there was an agreement in force when the changes were made. There is no indication by the court that it found the timing of the commencement of bargaining relevant to its decision.

11. Additionally, this court determines that under the duty to bargain in good faith, also embodied in section 2 First, 45 U.S.C. section 152a, the union is due relief. This court may impart definition to the interpretation of the duty to bargain in good faith from the National Labor Relations Act, 29 U.S.C. section 158(a)(5) (1982 & Supp. IV 1986) (the "NLRA"). Under the NLRA, the good faith duty to bargain precludes unilateral changes in wages, hours and other terms and conditions of employment anytime after negotiations have commenced. *NLRB v. Katz*, 369 U.S. 736 (1962).

The NLRA may be used as a guide to determine whether conduct by management or labor falls within the purview of the RLA. *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 383 (1969). Thus, in order to determine whether the airline's conduct in unilaterally changing working conditions can be construed as falling within the purview of the good faith bargaining mandated by the RLA, one may look to the NLRA for guidance.

In *Katz*, no collective bargaining agreement was in force when management and labor commenced negotiations. *NLRB v. Katz*, 369 U.S. at 740. During the second round of mediated negotiations, the union filed charges that management had breached its duty to bargain in good faith by unilaterally changing wages, rules and working conditions after negotiations had commenced but before an agreement was reached. *Id.* The Supreme Court held that unilateral action during the course of negotiations circumvents the duty to negotiate and frustrates the purposes of the Act as clearly as would a flat refusal to bargain. *Id.* at 747. This court, employing the reasoning of the *Katz* court, finds that the airline's mid-negotiation changes in medical insurance coverage, wages, and layoff and grievance procedures constitute a violation of the duty to bargain in good faith.

The Plaintiffs have and continue to suffer irreparable injury by the carrier's unilateral, material changes in the working conditions and rates of pay of the fleet service employees who the Plaintiffs, under law, are required to properly represent. These changes undermine the Union as the bargaining representative and if not enjoined would completely destroy the certified bargaining representative and would be violative of Section 2, Third of the Act which proscribes interference by a party with the selection of the other's representative, as well as Section 2, First.

Based upon the Defendant's above stated unilateral changes in the terms and conditions of employment of its fleet service employees there is a substantial likelihood that the Plaintiffs will prevail on the merits of their claims and a permanent injunction entered.

The irreparable injury to the Plaintiffs outweighs the harm this injunction may do the Defendant. Not only is the Union being undermined by the Defendant's unilateral changes in working conditions, the employees represented by the Union are also losing their faith in the worth of the present union and collective representation generally. The employer, on the other hand, will be burdened only with an inconvenience and some expense involved in restoring each of the unilateral changes. This Court legally concludes that the Plaintiffs' injury clearly outweighs the Defendant's harm.

The entry of the Preliminary Injunction is consistent with the public interest in that it will require the Defendant to adhere to its duty to bargain in good faith as required by the Railway Labor Act and will prevent further undermining of the Plaintiffs' status as collective bargaining representative.

WHEREFORE, based on all of the above, it is hereby ORDERED AND DECREED that:

1. The Defendant herein, including its officers, directors, agents and employees, shall cease and desist from bar-

gaining in bad faith and unilaterally changing the terms and conditions of employment while the parties are attempting to negotiate a collective bargaining agreement.

2. The Defendant herein shall immediately restore the grievance and arbitration procedures, and together with the Plaintiffs, resolve through expedited arbitration all of the alleged improper discharges; the alleged layoffs in disregard to seniority order; and the alleged work crew compliment changes.

3. The Defendant herein shall immediately restore all insurance benefits and bonuses.

4. The Court hereby sets the hearing for Permanent Injunction on the *5th* day of *September at 4:00 p.m.*, 1989, and if the Plaintiffs continue to prevail, the Defendant should be prepared to show cause as to why the monetary unilateral changes, which include the insurance benefits and bonuses, should not be restored to the date that they were unilaterally and improperly changed.

DATED at Miami, Dade County, Florida on this *2nd* day of *August*, 1989.

/s/ William M. Hoeveler
WILLIAM M. HOEVELER
DISTRICT JUDGE

Copies to Counsel of Record

APPENDIX C

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 89-5912

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; DISTRICT 100, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Plaintiffs-Appellees,

versus

TRANSPORTES AEREOS MERCANTILES PAN AMERICANOS, S.A., a/k/a TAMPA AIRLINES,

Defendants-Appellants.

FILED May 3, 1991
U.S. Court of Appeals
Eleventh Circuit
Miguel J. Cortez, Clerk

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 198__, ___ F.2d ___).
Before: HATCHETT and ANDERSON, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

PER CURIAM:

(XX) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having required a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson, III
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 89-5912

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; DISTRICT 100, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Plaintiff-Appellant,

versus

TRANSPORTES AEREOS MERCANTILES PAN AMERICANOS, S.A., a/k/a TAMPA AIRLINES,
Defendant-Appellee.

Miguel J. Cortez, Clerk
FILED May 17, 1991
U.S. Court of Appeals
Eleventh Circuit

Appeal from the United States District Court for the Southern District of Florida

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O R D E R:

( ) The motion of *Appellant* for (XX) stay ( ) recall and stay issuance of the mandate pending petition for writ of certiorari is DENIED.

(XX) The motion of *Appellant* for (XX) stay ( ) recall and stay of the mandate pending petition for writ of

certiorari is GRANTED to and including *JULY 1, 1991*, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period mentioned above there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ R. Lanier Anderson, III
UNITED STATES CIRCUIT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-1935-CIV-HOEVELER

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, et al.,

Plaintiffs,

vs.

TRANSPORTES AEREOS MERCANTILES PAN AMERICANOS, S.A., etc.,

Defendant.

AFFIDAVIT OF RODRIGO ARBOLEDA
(Attachments Omitted)

STATE OF FLORIDA)

ss:

COUNTY OF DADE)

BEFORE ME, the undersigned authority, personally appeared RODRIGO ARBOLEDA, who upon being duly sworn, deposed and said:

1. I am RODRIGO ARBOLEDA. Until 1989, I was the General Manager, United States, for Tampa Airlines. I held that position from February, 1985. I make this Affidavit upon my personal knowledge.

2. At all time subsequent to the certification of the IAM, Tampa Airlines has been ready, willing and able to bargain in good faith with the IAM and has done so. To that end, I directed that our attorney, Stuart A. Goldstein,

engage in negotiations on our behalf with designated representatives of the IAM. Mr. Goldstein made periodic reports to me as negotiations progressed. The parties first met in negotiations on November 12, 1987, at the Company's offices at Miami International Airport. The meeting consisted of a discussion by the Company and the Union of their needs and desires with myself emphasizing on behalf of the Company its frail financial position and the need to make changes in working conditions to satisfy our financial condition and to keep the Company viable. At that time, the Company operated four aircraft, two of which had been on the ground for approximately the past year undergoing maintenance checks and maintenance work totalling approximately two million dollars for each aircraft.

3. By letter dated December 17, 1987, the IAM forwarded to a contract proposal to me. In reality, this "proposal" was a completed agreement between the IAM and another airline, possibly with some changes made pertaining to Tampa Airlines. A copy of this December 17, 1987 letter is attached as Exhibit A. The Company responded to this letter through our attorney by letter dated December 21, 1987 (see Exhibit B attached hereto).

4. After this exchange of correspondence, I met with our attorney and we prepared an analysis of the IAM's contract proposal as well as an analysis of issues we wished to pursue in our own proposal. The Company subsequently forwarded a proposal to the IAM.

5. The parties next met in negotiations on May 9 and May 10, 1988. During the meeting on May 9, questions were asked by representatives for each party regarding the other's proposal. On May 10, the parties discussed issues such as consecutive days off, the thirty-minute meal period, Article 2, and Article 3. These meetings were conducted at the offices of our attorney and were attended only by Mr. Goldstein and Mr. Haber.

6. Thereafter, the parties met in direct bargaining on June 27, 1988, June 30, 1988, July 7, 1988 and January 12, 1989. In those meetings, the parties discussed and reached tentative agreements in whole or in part on the following sections:

Article 1—Recognition; Article 2—Scope; Article 3—Job classifications; Article 4—Seniority; Article 5—Filling of vacancies; Article 6—Hours of service; Article 7—Overtime; Article 8—Holidays; Article 9—Vacations; Article 10—Free and reduced rate transportation; Article 11—Leaves of absence without pay; Article 12—Sick leave; Article 13—Military leave; Article 14—Displacement, reduction and restoration in force; Article 15—Union representation; Article 16—Discipline and discharge; Article 17—Grievance procedure; Article 18—System Board of Adjustment; Article 19—Uniforms; Article 20—Machines and equipment; Article 21—Health and safety; Article 22—Bulletin boards; Article 23—Equal treatment; Article 24—Existing Agreement; Article 25—No strikes/no lockout; Article 26—Management rights; Article 27—General; Article 28—Mutual Agreement. Attached hereto as Exhibit C is a copy of Mr. Goldstein's letter of July 8, 1988, to Mr. Haber setting forth the substance of the negotiations to that point. On August 19, 1988, Mr. Haber acknowledged the accuracy of Mr. Goldstein's letter of July 8th. See Exhibit D attached.

7. The Union has been aware from the beginning that Mr. Goldstein did not have authority to bind the Company with respect to direct monetary items such as wages, benefits and insurance.

8. Tampa Airlines has always been available on a reasonable basis to meet with and negotiate with the IAM. Despite the rhetoric in Mr. Haber's Affidavit, the truth is that often times he was unavailable to meet for the purpose of advancing negotiations. For example, see Mr. Goldstein's letter of April 6, 1988, to Mr. Haber (Exhibit E)

indicating Mr. Haber's unavailability both in December and in April due to vacations. See also a copy of Mr. Goldstein's letter to Mr. Haber dated June 24, 1988, which was in response to Mr. Haber's letter of June 22 (Exhibit F) which again misstated the Company's availability to negotiate. This attempt to "build a case" that the Company was unavailable to negotiate has continued into this lawsuit and finds a place in Mr. Haber's Affidavit as well as in the proposed Amended Complaint.

9. Although I came to Tampa Airlines after the negotiations were concluded with the preceding Union (Teamsters), I was advised by my superiors in the Company that there was no Union contract in existence because neither the Company nor the Union had ever signed any such agreement. Rather, the negotiations had reached a certain point, the Company refused to go beyond that point in terms of further agreements, and the Teamsters, for whatever its reasons, chose not to pursue the issue. To my knowledge, there had never been a union at Tampa Airlines prior to the Teamsters, and there has never been a collective bargaining agreement in place at Tampa Airlines.

10. The Company has always retained the right to manage its business and to make changes which its management deems appropriate in the conduct of its business. That right has never been relinquished or restricted by a collective bargaining agreement. In accordance with this policy of making changes it deems appropriate or necessary in the management of its business, the Company made certain changes following the failure to reach an agreement with the Teamsters, which changes incorporated many of the items contained in the unexecuted Teamsters' "contract". Notwithstanding the implementation of those unilateral changes, which no one has ever objected to, the Company retained the right to make other changes it deemed necessary or appropriate and has continued to do so.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Rodrigo Arboleda
Rodrigo Arboleda

SWORN TO AND SUBSCRIBED before me, this 2 day of June, 1989.

/s/ Notary Public
Notary Public, State of Florida

My Commission Expires: [stamped]

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 85-0125 HMF

UNION OF FLIGHT ATTENDANTS, LOCAL NO. 1
Plaintiff,

vs.

AIR MICRONESIA, INC.
Defendant.

Filed in the United States District
District of Hawaii Court
August 30, 1988
Walter A.Y.H. Chinn, Clerk

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant's motion for summary judgment and plaintiff's cross-motion for partial summary judgment came on for hearing on August 22, 1988. Gary G. Grimmer and Richard L. Cys appeared on behalf of defendant. Ira L. Gottlieb appeared on behalf of plaintiff. The court has considered the submissions and arguments of counsel, together with the materials on file, and being fully apprised of the premises herein now rules as follows:

BACKGROUND

In 1968 Continental Airlines, Inc. executed an agreement with the Trust Territory of the Pacific to provide air transportation services in the Trust Territory. Continental joined with the United Micronesia Development Association and Aloha Airlines, Inc. to form defendant Air Micronesia.

Under this agreement fifty percent of Air Micronesia's flight attendants were Continental employees and the remaining fifty percent were employees of Air Micronesia. Working conditions for the Continental flight attendants were governed by a collective bargaining agreement between Continental and the Union of Flight Attendants. Flight attendants who were employees of Air Micronesia had no collective bargaining agreement. Although Air Micronesia at times referred to the Continental collective bargaining agreement when setting working conditions for its own employees, it was under no obligation to do so.

On November 3, 1982 the National Mediation Board certified plaintiff Union of Flight Attendants Local 1 (UFA) as the authorized employee representative of Air Micronesia's flight attendants. Although Air Micronesia (with assistance from Continental) has bargained with UFA intermittently since certification and although the parties have at times reached agreement on certain collective bargaining issues, the parties have never executed a collective bargaining agreement.

On September 24, 1983 Continental filed a Chapter 11 petition with the United States Bankruptcy Court for the Southern District of Texas. On that same date Continental furloughed its flight attendants, including those who were flying in the service of Air Micronesia. A number of these individuals applied for direct employment with Air Micronesia which hired ten of these individuals, although at lower wages.

On February 7, 1985 plaintiff filed this lawsuit alleging violations of §§ 2, 5 and 6 of the Railway Labor Act (RLA). 45 U.S.C. § 151 *et seq.* Specifically, UFA's complaint alleged that, between 1983 and 1985, Air Micronesia initiated the following policies and actions in violation of the RLA:

Complaint ¶	Allegation
11(a)	Refused to provide information regarding Air Micronesia finances and the relationship between Continental and Air Micronesia during 1984 bargaining sessions.
11(b)	Changed probationary period for new employees from six to twelve months.
11(c) (i)	Created two-tier system of pay and conditions of employment.
11(c) (ii)	Refused to provide pay raises to Air Micronesia flight attendants hired prior to September 27, 1983.
11(c) (iii)	Restricted attendants' ability to trade trips.
11(c) (iv)	Changed bidding options for reserve flight duty.
11(c) (v)	Expanded First Flight Attendant duties.
11(c) (vi)	Created policy of illness verification for some, but not all, flight attendants.
11(c) (vii)	Required flight attendants to clean aircraft.
11(c) (viii)	Created new attendance and tardiness policy.
11(c) (ix)	Discontinued policy of notifying attendants of flight delays.

11(c) (x)	Required that flight attendant be responsible for "change fund" and liquor money.
11(c) (xi)	Changed monthly bid runs from 75-80 hours to 85-90 hours.
11(c) (xii)	Required flight attendants to remain on board aircraft in Japan and Manila.
11(c) (xiii)	Instituted, then disbanded, flight attendant concerns committees.
11(c) (xiv)	Eliminated opportunity to earn extra pay for speaking Chinese.
11(c) (xv)	Reduced First Flight Attendant pay.
11(c) (xvi)	Eliminated opportunity to earn extra pay for speaking Japanese.
11(c) (xvii)	Eliminated pay for second and third days of recurrent training.
11(c) (xviii)	Denied direct access to master schedule.
11(c) (xix)	Reduced size of flight attendant lounge.
11(c) (xx)	Increased flight time from 94 and 1/2 hours to 100 hours.
11(c) (xxi)	Reduced duration and availability of maternity leave.
11(c) (xxii)	Withdrew offers and contract proposals during negotiations without good cause.
11(c) (xxiii)	Refused to offer employment to former Continental flight attendants on basis of their union affiliation.

On April 5, 1988 the court granted defendant's motion for partial summary judgment, holding that Hawaii's one-year statute of limitations applies to plaintiff's cause of action under the RLA. Although the court found that plaintiff's claims were barred to the extent that they ac-

crued on or before February 7, 1984, it declined to address the issue of which claims, if any, are actually barred.

DEFENDANT'S ARGUMENTS

Air Micronesia has now filed a second motion for summary judgment. First, it argues that eighteen of UFA's twenty-five claims are barred by the applicable statute of limitations.

Second, it argues that it is entitled to summary judgment on the claim in ¶ 11(a) of plaintiff's complaint, because the RLA imposes no duty on Air Micronesia to provide the information plaintiff sought.

Third, Air Micronesia argues that it is entitled to summary judgment on all of plaintiff's claims that it violated the "status quo" requirements of the RLA because (1) there is no duty to maintain the status quo in the absence of an earlier collective bargaining agreement and (2) if the status quo requirements do apply, any violations were of minimal significance.

Finally, Air Micronesia argues that it is entitled to summary judgment on plaintiff's claim that it has violated its duty under the RLA to negotiate with UFA in good faith.

PLAINTIFF'S ARGUMENTS

UFA opposes defendant's motion and has filed its own motion for partial summary judgment. First, it argues that Air Micronesia has not satisfied its burden of showing that UFA had actual or constructive notice of Air Micronesia's alleged violations prior to February 7, 1984. Therefore, Air Micronesia is not entitled to summary judgment on the statute of limitations issue.

Second, UFA argues that the RLA imposed a duty on Air Micronesia to provide information concerning its financial position and concerning the authority of its ne-

gotiators. Therefore, plaintiff is entitled to summary judgment on the claim in ¶ 11(a) of its complaint.

Third, UFA argues that the RLA imposed a duty on Air Micronesia not to alter the status quo concerning flight attendant working conditions without first exhausting the procedures outlined in 45 U.S.C. § 156. For this reason, and because the violations were not minimal, UFA argues that it is entitled to summary judgment on all its claimed "status quo" violations.

Finally, UFA argues that Air Micronesia's actions raise a genuine issue of material fact concerning whether or not defendant bargained with UFA in good faith.

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file in the case that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n.* 809 F.2d 626, 630 (9th Cir. 1987). *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The movant must be able to show "the absence of a material and triable issue of fact," *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987), although it need not necessarily advance affidavits or similar materials to negate the existence of an issue on which the non-moving party will bear the burden of proof at trial. *Cal. Arch. Bldg. Prod.*

v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988). *See Celotex*, 477 U.S. at 325, 106 S. Ct. at 2553. *But cf. id.*, 477 U.S. at 328, 106 S. Ct. at 2555-56 (White, J., concurring).

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support his legal theory. *Commodity Futures Trading Comm'n. v. Savage*, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the movant's evidence at trial. *See T.W. Electrical*, 809 F.2d at 630. Similarly, legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Moreover, "if the factual context makes the nonmoving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics*, 818 F.2d at 1468, *citing Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1289, *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2512 (1986). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Id.*

However, when "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *T.W. Electrical*, 809 F.2d

at 631. Also, inferences from the facts must be drawn in the light most favorable to the non-moving party. *Id.* Inferences may be drawn both from underlying facts that are not in dispute, as well as from disputed facts which the judge is required to resolve in favor of the non-moving party. *Id.*

STATUTE OF LIMITATIONS

Air Micronesia argues that eighteen of UFA's twenty-five claims against it are barred by the applicable one-year statute of limitations. These claims are found in paragraphs 11(b), 11(c) (i)-(v), (vii), (ix)-(xvii) and (xx)-(xxi). Air Micronesia contends that in each case the statute of limitations began to run on the date that it first implemented the policy giving rise to the alleged violation. Thus when, for example, on October 1, 1983 Air Micronesia changed its probation period for new employees from six to twelve months (¶ 11(b) of the complaint), UFA had one year—until October 1, 1984—to file suit over the change. Because it did not do so, defendant argues, this claim is barred.

UFA, however, contends that the statute of limitations did not begin to run until it received actual or constructive notice of each Air Micronesia policy change. UFA contends that Air Micronesia never notified it of any policy changes and, in some cases, actually took steps designed to conceal changes from UFA.

The law of this circuit is clear on this point. "A cause of action accrues, and the statute of limitations begins to run, when a plaintiff knows or has reason to know of the injury that is the basis of the action." *Hotel Employees Health Trust v. Elks Lodge 1450*, 827 F.2d 1324, 1328 (9th Cir. 1987). Air Micronesia is not entitled to summary judgment on any claim, based upon the running of the statute of limitations, unless it can demonstrate that UFA knew or had reason to know of the alleged violation.

Thus, the statute of limitations does not necessarily bar plaintiff's claim in ¶ 11(b) of its complaint. There is no evidence that Air Micronesia informed either the union or its members of the new policy until July 1984 when it terminated a flight attendant. Air Micronesia certainly cannot implement a policy change, keep that change to itself for the better part of a year, and then benefit from the statute of limitations. Defendant has failed to carry its burden of showing that the statute of limitations began to run on plaintiff's ¶ 11(b) claim prior to February 7, 1984. *See T.W. Electrical*, 809 F.2d at 630.

With two sets of exceptions, Air Micronesia has failed to carry its initial burden with respect to the other claims it now argues are time-barred. (Defendant's attempt to carry this burden in its reply memorandum is ineffective because plaintiff has no opportunity to respond.)

The first set of exceptions involve the claims found in ¶¶ 11(c)(iii) and (vii) of plaintiff's complaint. In each of these cases there is evidence that defendant's flight attendant supervisor, Martha Woodward, issued a memorandum outlining the alleged policy change. Air Micronesia has thus satisfied its burden of demonstrating that UFA had notice of the change.

Plaintiff, however, argues that these memoranda were placed in a looseleaf binder in the crew lounge and that access to this binder was difficult. The affidavit of Juanita Capulong, UFA's local executive chairperson, supports this contention. *See* Capulong aff. ¶ 8. Although UFA's evidence is weak, it does raise a genuine issue concerning whether UFA knew or should have known about the changes.

The other set of exceptions involves alleged policy changes that had such an immediate and apparent impact on Air Micronesia flight attendants that they could not be missed. Plaintiff admits that prior to February 7, 1984 it received such notice of the policy changes that form the

basis for its claims in ¶¶ 11(c) (i), (ii), (iv), (xi), (xiii) and (xxiii). These six claims are therefore barred by the statute of limitations and summary judgment is appropriate.

DEFENDANT'S DUTY TO PROVIDE INFORMATION

In September and October 1984 the parties held several additional collective bargaining sessions. During these sessions Air Micronesia withdrew several proposals to which it had previously agreed. One reason for this action may have been Air Micronesia's belief that it could no longer afford these proposals. UFA made oral and written requests that Air Micronesia provide the union with books and records to substantiate this belief. Air Micronesia refused.

During these same meetings, several Continental executives acted as Air Micronesia's lead negotiators, apparently for the first time. UFA made oral and written requests that Air Micronesia (1) identify its collective bargaining representatives and (2) state what authority, if any, the Continental executives had to represent Air Micronesia. Defendant did not respond.

Air Micronesia argues that it is entitled to summary judgment on plaintiff's claim that its failure to provide the above information violates the RLA. Defendant argues that the RLA imposes no duty to provide this information.

UFA argues that Air Micronesia does have a duty to disclose information concerning its financial position and concerning the authority of its negotiators. In support of this claim, UFA relies upon an RLA provision that imposes a general duty on all parties "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions . . . ." 45 U.S.C. § 152 First. Because Air Micronesia has failed to disclose the requested information, it has not exerted "every reasonable effort" to conclude a collective bargaining agreement with UFA.

Section 152 First does not require Air Micronesia to disclose financial information to substantiate its bargaining position or to explain the source of its designated representatives' authority. The Court of Appeals for the Ninth Circuit has recently held that requiring such disclosure as part of an employer's duty to make every reasonable effort to avoid labor disputes "is incompatible with the aims and structure of the Railway Labor Act." *Pacific Fruit Express v. Union Pacific*, 826 F.2d 920, 923 (9th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3860 (June 20, 1988).

Plaintiff relies upon *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 76 S. Ct. 753 (1956). In that case, the Supreme Court held that § 204(a) (1) of the National Labor Relations Act requires such disclosure in certain circumstances. *Truitt Manufacturing*, 351 U.S. at 152-53, 76 S. Ct. at 755-56. UFA argues that this court should use the *Truitt* rationale to imply such a duty under the RLA. In *Pacific Fruit*, however, the court of appeals rejected this same argument, holding that the duty under the NLRA to bargain in good faith is not identical to the obligation under the RLA to exert every reasonable effort to settle disputes. *Pacific Fruit*, 826 F.2d at 922. Furthermore, the court of appeals found that Congress did not intend that the RLA "place the courts at the heart of the bargaining process whenever either side . . . sought information about the other." *Id.* at 923.

Plaintiff argues that the facts of this case are distinguishable from those in *Pacific Fruit* and therefore *Truitt*, not *Pacific Fruit*, should apply to this case. However, the court can see no *material* distinction between this case and *Pacific Fruit*. Defendants in both cases refused to provide information to support their collective bargaining positions. Plaintiffs in both cases argued that this refusal violates § 152, First of the RLA.

Even if the two cases are distinguishable, the court's ruling in *Pacific Fruit* rested upon the "aims and struc-

ture" of the RLA. Thus the breadth of the decision makes it difficult to avoid. This court therefore concludes that the RLA does not require Air Micronesia to disclose information about its finances or about its negotiators. Air Micronesia is entitled to summary judgment on plaintiff's ¶ 11(a) claim.

DEFENDANT'S DUTY TO MAINTAIN THE STATUS QUO

Air Micronesia next argues that it is entitled to summary judgment on all of plaintiff's claims that it violated the "status quo" requirements of the RLA because (1) there is no duty to maintain the status quo in the absence of an earlier collective bargaining agreement and (2) if the status quo requirements do apply, any violations were of minimal significance.

UFA contends that the RLA does impose a duty on Air Micronesia not to alter flight attendant working conditions without first exhausting the procedures outlined in 45 U.S.C. § 156. That section prohibits an employer (or a union) from unilaterally changing "agreements affecting rates of pay, rules, or working conditions" without first exhausting an elaborate procedure designed to resolve the dispute. 45 U.S.C. § 156. UFA alleges that Air Micronesia unilaterally altered flight attendant rates of pay, rules and working conditions without first submitting to § 156 procedures. These allegations are contained in ¶¶ 11(b) and 11(c) of plaintiff's complaint. Because defendant unilaterally altered the status quo and because its changes were not minimal, UFA argues that it is entitled to summary judgment on all these claims.

There is no genuine dispute over the fact that a collective bargaining agreement did not exist between Air Micronesia and UFA. Neither is there a genuine dispute over the fact that Air Micronesia made a large number of unilateral policy changes affecting flight attendant pay, rules and working conditions. The issue for this court to

decide, therefore, is the legal question of whether the status quo provisions of § 156 apply to an employer who has no pre-existing collective bargaining agreement with a union.

In 1942, the Supreme Court held that § 156 only applies to situations in which the status quo reflects a pre-existing collective bargaining agreement. *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 402-03, 62 S. Ct. 659, 669 (1942). In that case, the Brotherhood of Railway and Steamship Clerks complained that the Union Terminal Company had unilaterally altered the terms under which station redcaps retained tips. The change took place after the redcaps had designated the Brotherhood as its bargaining representative, but before negotiations on a collective bargaining agreement took place.

The Court held that the RLA "is phrased so as to leave no doubt that only agreements reached after collective bargaining were covered" by the status quo provisions of § 156. *Id.*, 315 U.S. at 400, 62 S. Ct. at 668. Without such a pre-existing collective bargaining agreement, the parties remain free to alter the terms of their relationship. Thus, if an employer alters an employee's working conditions, and if the employee continues to work, a new contract reflecting the alteration arises between the parties. *Id.*, 315 U.S. at 667, 62 S. Ct. at 39B.

Subsequent cases have undercut this holding. Although these cases do not involve status quo changes in the absence of a pre-existing collective bargaining agreement (the factual situation in both *Williams* and this case), plaintiff urges the court to conclude that *Williams* is defunct and may be ignored. The court declines to do so.

The first case to erode the *Williams* holding is *Detroit and Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142, 90 S. Ct. 294 (1969). In that case, a pre-existing collective bargaining agreement was in place, but management made unilateral changes concerning work-

ing conditions not expressly covered in the agreement. The Supreme Court held that the status quo provisions of § 156 applied to such changes, stating that "the status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement." *Id.* at 153, 90 S.Ct. at 301. In spite of this language, the Court declined to overrule *Williams*. Instead, it distinguished *Williams* as a case involving no pre-existing collective bargaining agreement.

Williams was further eroded in *Chicago and Northwestern R.R. v. United Transportation Union*, 402 U.S. 570, 91 S. Ct. 1731 (1971). In that case a prior collective bargaining agreement had expired. The employer sought an injunction to prevent the union from calling a strike. The Supreme Court found that a party's duty under § 152 First to exert every reasonable effort to reach an agreement authorized it to seek an injunction to prevent any unilateral change in the status quo, even where a collective bargaining agreement has expired. *Chicago and Northwestern*, 402 U.S. at 583, 91 S. Ct. at 1738.

The case before the court today differs from both *Shore Line* and *Chicago and Northwestern* in that Air Micronesia has *never* entered into a collective bargaining agreement with UFA. Although negotiations have dragged on for years and although the parties have at times agreed on certain terms, these factors do not create a collective bargaining agreement in the absence of the parties' consent.

The *Williams* case, if it stands for anything, stands for the proposition that unilateral changes in the status quo do not violate § 156, unless that status quo results from a pre-existing collective bargaining agreement. The Supreme Court has not faced this issue since *Williams*, nor has it ever overruled the *Williams* holding. This court is therefore bound to follow that case this issue.

The Court of Appeals for the District of Columbia Circuit has recently reached the same conclusion. *International Association of Machinists v. Trans World Airlines*, 839 F.2d 809, 814 (D.C. Cir. 1988). In that case, the court reversed the district court's decision to enjoin defendant's unilateral changes in working conditions, even though no pre-existing collective bargaining agreement had been executed. After reviewing the above case law, the court of appeals concluded that *Williams*, "though weakened, is not dead."

> Thus, no power to enjoin unilateral changes in working conditions by management flows from Section 6 of the Act in the absence of pre-existing, in place, collective bargaining agreements.

Id.

The court reaches the same conclusion and finds that Air Micronesia was under no duty to follow the procedures of 45 U.S.C. § 156. Therefore, defendant is entitled to summary judgment on plaintiff's claims based upon § 156 as set forth in ¶¶ 11(b) and 11(c).

DEFENDANT'S DUTY TO BARGAIN IN GOOD FAITH

The only claims remaining against Air Micronesia are allegations that it has violated its duty to negotiate with UFA in good faith. Air Micronesia argues that it is entitled to summary judgment on these claims as well. Specifically, it argues that plaintiff's bad faith claims stem from two incidents: (1) Air Micronesia's decision to withdraw contract proposals upon which it had previously agreed (complaint ¶ 11(c)(xxii)) and (2) its alleged refusal to offer employment to former Continental flight attendants due to their union affiliation (complaint ¶ 11(c)(xxiii)).

A fair reading of plaintiff's complaint shows that UFA's bad faith claims are not confined to these two incidents. On the contrary, ¶ 11 of plaintiff's complaint outlines a

pattern of bad faith conduct on a large number of issues. UFA argues that Air Micronesia's conduct, viewed as a whole, indicates that it did not intend to conclude a collective bargaining agreement with the union and that it went out of its way to frustrate contract negotiations.

Air Micronesia was under a duty to "exert every reasonable effort" to make a collective bargaining agreement with the union. 45 U.S.C. § 152 First. This does not mean that the airline was under an obligation to negotiate in good faith. *Pacific Fruit*, 826 F.2d at 922 (§ 152 First duty "is not identical to the obligation to bargain in good faith under the NLRA"). Instead, § 152 First merely prohibits Air Micronesia from bargaining in bad faith. *Chicago & North Western*, 402 U.S. at 579 n.11, 91 S. Ct. at 1736 n.11. The difference is more than one of semantics. Whereas good faith bargaining implies that Air Micronesia wishes to reach a fair agreement, bad faith bargaining implies that Air Micronesia does not wish to reach any agreement at all, even one that is unfair to UFA.

Plaintiff's burden at trial therefore is to show that Air Micronesia did not wish to reach any collective bargaining agreement at all. On this motion for summary judgment plaintiff must raise a genuine issue of fact in support of this legal theory.

Plaintiff cannot satisfy this burden by pointing to evidence that defendant did not provide information as alleged in ¶ 11(a), or that defendant violated the status quo as alleged in ¶¶ 11(b) and (c). The court has held that the RLA does not impose such obligations upon Air Micronesia. It would be inconsistent for this court to hold that the general language of 45 U.S.C. § 152 First requires imposes a more stringent duty than the specific language of such sections as § 156.

The court has questioned plaintiff's counsel closely at oral argument in an attempt to learn which of its other claims in ¶ 11 constitute evidence of bad faith bargaining.

Counsel could only offer persuasive argument in support of one claim: that found in ¶ 11(c)(22). Plaintiff has not persuaded the court that any other event constitutes a relevant indicia of bad faith.

Since the event described in ¶ 11(c)(xxii) of plaintiff's complaint raises an issue of fact about whether Air Micronesia bargained with UFA in bad faith, defendant's motion for summary judgment on plaintiff's bad faith claim is denied to this extent. In all other respects, however, defendant's motion is granted.

SUMMARY

Defendant's motion for summary judgment should be GRANTED IN PART AND DENIED IN PART. Plaintiff's cross-motion for partial summary judgment should be DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, August 30, 1988

/s/ Harold M. Fong
UNITED STATES DISTRICT JUDGE

UFA V. AIR MICRONESIA
Civ. No. 85-0125
ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

M E M 0 R A N D U M*

No. 88-15754

D.C. No. CV-85-125-HMF

UNION OF FLIGHT ATTENDANTS, LOCAL NO. 1,
Plaintiff-Appellant,

vs.

AIR MICRONESIA, INC.,
Defendant-Appellee.

Filed May 10, 1990
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, District Judge, Presiding

Argued and Submitted April 10, 1990
Honolulu, Hawaii

Before: FARRIS, PREGERSON, and RYMER, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

The district court's orders of April 5, 1988, *Union of Flight Attendants, Local No. 1 v. Air Micronesia, Inc.*, 684 F. Supp. 1520 (D. Hawaii 1988), and August 30, 1988, *Union of Flight Attendants, Local No. 1 v. Air Micronesia, Inc.*, Civ. No. 85-0125 HMF (D. Hawaii Aug. 30, 1988), are affirmed for the reasons stated in those orders.

APPENDIX G

RAILWAY LABOR ACT PROVISIONS

45 U.S.C. § 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 155. Functions of Mediation Board

First. Disputes within jurisdiction of Mediation Board

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke

the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. Interpretation of agreement

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation

Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents

The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 157 of this title:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 157 of this title, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board in accordance with the provisions of this chapter, shall be removed by such Board as provided by this chapter, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this chapter for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgement of an agreement to arbitrate

under this chapter. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators, necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member

of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact, including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by the contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delviery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

45 U.S.C. § 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

45 U.S.C. § 157. Arbitration

First. Submission of controversy to arbitration

Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151 to 156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: **Provided, however**, that the failure or refusal of either party to submit to a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.

45 U.S.C. § 160. Emergency Board

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: **Provided, however**, that no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

45 U.S.C. § 181. Application of subchapter I to carriers by air

All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall

cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.